Supreme Court, U.S.
FILED
5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1984

In The

Supreme Court of the United States

October Term, 1988

SAN FRANCISCO POLICE OFFICERS' ASSOCIATION, LYNNE A. TORRES, LILLIAN CHAI MATTOCH, and HENRY KIRK,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; CIVIL SERVICE COMMISSION; LOUIS HOP LEE, REVEREND DR. HOWARD S. GLOYD, CARLOTA TEXIDOR DEL PORTILLO, GENEVIEVE W. POWELL, and A. LEE MUNSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

(1) Are the persons who would have been promoted had a municipal employer persisted in using the results of a promotional examination which generated adverse impact and had not been validated victims of employment discrimination entitled to a remedy under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e, *et seq.*)?

(2) May the courts award promotional and/or monetary remedies to persons who have not themselves filed suit and are not members of a certified class for alleged violations of their rights by a municipal employer which utilizes a race-conscious selection procedure to compensate for the results of an invalid promotional examination given pursuant to a Title VII consent decree?

(3) May a municipal employer be required under Title VII to attempt to validate a promotional examination given pursuant to a consent decree when the results of that examination demonstrate adverse impact against minorities and women, expert evidence indicates that the employer failed to consider alternatives which would not generate adverse impact, and when there is available to that employer an alternative selection procedure which does not generate adverse impact and which is concededly as valid a selection mechanism as the original procedure?

PARTIES

The parties to the proceedings below were as follows: Petitioners San Francisco Police Officers' Association, Lynne A. Torres, Lillian Chai Mattoch, and Henry Kirk were the plaintiffs in the district court and appellants in the Court of Appeals. Respondents City and County of San Francisco and its Civil Service Commissioners Louis Hop Lee, Reverend Dr. Howard S. Gloyd, Carlota Texidor Del Portillo, Genevieve W. Powell, and A. Lee Munson were defendants in the district court and appellees in the Court of Appeals.

The Association is a labor organization representing police officers, sergeants, and inspectors in their employer-employee relations with the City. Torres, Mattoch, and Kirk took the promotional examinations described herein and claim they were adversely affected by the post-test reweighting of examination components, weights, and cutoffs described herein.

Officers for Justice, an organization of minority and female police officers and applicants, and a signatory to the consent decree underlying this action, participated as intervenors on behalf of respondents in the proceedings below. The Department of Justice of the United States of America participated as *amicus curiae* on behalf of respondents. The California Organization of Police and Sheriffs participated as *amicus curiae* on behalf of the petitioners.

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STATEMENT OF THE CASE

This case began in 1973 when Officers for Justice, an organization of minority and female police officers and applicants, brought suit alleging discrimination based on race and sex in the San Francisco Police Department. The suit was settled when a consent decree was approved on March 30, 1979. *Officers for Justice v. Civil Service Commission*, 473 F.Supp. 801 (N.D.Cal. 1979), *aff'd* 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). The parties to the consent decree are the City and County of San Francisco ("City"), Officers for Justice ("OFJ"), the San Francisco Police Officers' Association ("POA"), and the United States. Prior to entry of the consent decree the district court had found certain of the City's selection procedures for entry level and police sergeant positions to be discriminatory and in violation of federal law. The court had also issued partial summary judgment to the United States with respect to certain of the City's examinations. (Appendix H, 2-3)

The consent decree established no numerical goals or quotas for promotional positions but does require the City to utilize valid, nondiscriminatory promotional selection devices. It states:

> The City shall, except as provided herein, make no further use of . . . any tests, qualifications, standards or other procedures within said Department which have a disproportionately adverse impact against minorities or females, unless and until such standards have been shown to be valid, pursuant to the *Uniform Guidelines on Employee Selection Procedures*, 43 Fed.Reg. 38290, August 25, 1978, or any superceding federal guidelines. (Appendix H, 18)

In 1983 the City gave examinations for promotion to Q-35 Assistant Inspector and Q-50 Police Sergeant. The examinations were in three parts: a multiple choice test measuring technical knowledge and problem solving; a writing skills test; and an oral test measuring ability to communicate, interpersonal qualities, and supervisory abilities. No weighting scheme for utilizing the three components was established prior to administration of the examinations. However, while the examinations were being administered, the City, through its Civil Service Commission, acquiesced to the demands of the POA and set weights for each of the examination components. When the examinations were administered and graded according to the established formula, there was slight adverse impact on women in the assistant inspector examination and substantial adverse impact on minorities in both examinations.

OFJ and the United States challenged the results. A court-appointed expert indicated that the examinations could not be validated under the *Uniform Guidelines*. Evidence presented to the district court showed that incumbent sergeants and assistant inspectors with superior job performance who had pretested the examinations scored so poorly on the basis of the initial weights that they would have had no reasonable chance of appointment in light of the examination results. (Appendix F, 5) Rather than attempt to validate the results, the City established new weights for the examination components. When graded pursuant to the new weights there was no adverse impact on women or minorities. When 120 appointments were made from the eligibility lists based on the revised weights, they included 28 minorities, 16

women and 76 white men. Had the original weights been used the results would have been approximately 12 minorities, nine women, and 99 white men.

After protesting the City's establishment of new weights for the examination components, the Police Officers' Association and three of its members filed an action for declaratory and injunctive relief in the California Superior Court for the City and County of San Francisco. They claimed that the City's action violated the City Charter and rules of its Civil Service Commission. The City removed the action to federal court, which concluded that the Police Officers' Association had attempted to evade the procedures established by the consent decree for resolving disputes over the development and administration of examinations.

Chief Judge Robert F. Peckham ruled that the plan adopted by the City to remedy the adverse impact resulting from the promotional examinations was a permissible affirmative action plan under this Court's decision in *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979). The district court concluded that the City's plan was designed to break old patterns which had virtually excluded minorities from the rank of sergeant; did not create an absolute bar to white male employees; was a temporary measure to correct the adverse impact of one set of examinations; and did not unnecessarily trammel the interests of nonminority candidates, in that under the new weighting scheme promotions were based on demonstrable merit and white males still received the vast majority of them. (Appendix F, 7-15)

Following the district court's decision and prior to the Ninth Circuit's first opinion in this case, the parties to the consent decree negotiated a supplement to it, approved by the district court on October 27, 1986. That order prevents the City from changing announced scoring standards after an examination has been given. (Appendix C, 3)

The POA appealed. In its first opinion (of March 12, 1987) the Ninth Circuit concluded that the City had properly thrown out the test results based upon the original weights which generated adverse impact. It noted that under the consent decree and the *Uniform Guidelines,* employers may discard tests that generate adverse impact and may use different selection procedures that do not have an adverse impact as an alternative to validating challenged test procedures. *See,* 29 C.F.R. §1607.6A (1988); *Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures,* 44 Fed.Reg. 11,996, 12,001, Question and Answer n. 31 (1979). The *Uniform Guidelines* require that to validate a selection procedure an employer must consider alternative selection procedures. 29 C.F.R. §1607.3B (1988). In examining alternatives, the employer should also consider alternative methods of using the selection procedure. 29 C.F.R. §1607.5G (1988); 43 Fed.Reg. 38,290, 38,291 (1979). An employer may find that a selection procedure that is valid when scored on a pass/fail basis is invalid when used as a ranking device. 29 C.F.R. §1607.5G (1988). The alternative selection procedure should be used when it has less adverse impact

and when the evidence demonstrates its validity is substantially the same or greater than the challenged procedure. 29 C.F.R. §1607.3B (1988); 44 Fed.Reg. 11,996, 12,003, Questions and Answers Nos. 50-51 (1979). (Appendix D, 9)

The Ninth Circuit noted that the City and the Police Officers' Association agreed that the examination components as reweighted were as job-related as they were under the initial weights. However, the alternative weighting procedure eliminated the test's adverse impact. The Ninth Circuit concluded that the City could not validate the test as originally weighted under the *Uniform Guidelines,* because an alternative selection procedure existed that was equally job related but had no adverse impact. Finding that the City was obligated under the consent decree and the *Uniform Guidelines* to discard the original test results, the court concluded that City Charter and Civil Service rules which prevented the City from complying with the decree and the *Uniform Guidelines* were of no import in light of the Supremacy Clause. (Appendix D, 9-10)

Although concluding that the City was obligated to discard the original test results and could use the examinations in a different manner in order to eliminate adverse impact, the Ninth Circuit nonetheless found that the City violated Title VII when it reweighted the components. It ruled that, "Reweighing unlawfully displaced candidates on the basis of their race and gender." (Appendix D, 13) The Ninth Circuit concluded that the City had taken an inappropriate shortcut in order to remedy the results of the adverse impact of the examinations as originally scored and that the City was obligated

to discard the results of the examinations and devise and administer new selection procedures. (Appendix D, 14-15)

In its second opinion (announced March 24, 1988, following petitions for rehearing), the Ninth Circuit noted that appointments had already been made on the basis of the revised test weights. It found that it would be inequitable to penalize those appointed by ousting them from their positions. *United States v. Navajo Freight Lines*, 525 F.2d 1318, 1326 (9th Cir. 1975). *See, Firefighters Local Union 1784 v. Stotts*, 467 U.S. 561, 579 (1984).

The court held that no individual had the right to displace an incumbent because the original tests were not validated under the consent decree. *Stotts*, 467 U.S. 561, 579. The Ninth Circuit concluded that no further remedy was necessary because the district court's order of October 27, 1986, forbids the City from again reweighting an examination after initial scoring standards had been set. Accordingly, the court dismissed the case as moot. (Appendix C, 2-3)

Following the POA's further petition for rehearing, the Ninth Circuit on March 7, 1989, issued its final opinion which differed from its second opinion only in its conclusion. The court again ruled that because the test was not in compliance with the consent decree, the persons who scored well on it acquired no rights. (*See, Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 484-485 (6th Cir. 1985), *aff'd sub. nom. Local 93 v. City of Cleveland*, 478 U.S. 501 (1986).) The court again concluded that it would be inequitable to remove those persons who were appointed pursuant to the revised weighting

scheme. It noted that the Police Officers' Association had not sought back pay in this action but had simply requested the declaratory relief given by the Ninth Circuit's opinion. Finally, it found that it was unnecessary to order the City to refrain from again reweighting examination components after the original scoring standards had been announced and the examination given. Although the Ninth Circuit ordered no further remedies in this case, it reversed the judgment of the district court. (Appendix A)

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT PETITIONERS HAD OBTAINED ALL THE RELIEF TO WHICH THEY WERE ENTITLED IN THIS ACTION.

In suggesting that the Ninth Circuit improperly denied them remedies to which they were entitled petitioners misstate the Court of Appeals decision and ignore the history of this litigation. Petitioners claim that the Ninth Circuit decision "stands in stark contrast" to decisions of this Court mandating relief for persons who establish that they have been victims of employment discrimination. Petitioners' argument must fail for two reasons. First, petitioners have never established that they are victims of employment discrimination. Second, the Ninth Circuit ordered appropriate relief for the Title VII violation it found.

This action began as a suit for declaratory and injunctive relief in the Superior Court for the City and County

of San Francisco. (Appendix D, 5) The Police Officers' Association sought orders requiring the City to utilize the examination results based upon the original weighting plan, arguing that the San Francisco Charter and applicable Civil Service rules forbid the City from changing the weights assigned to each examination component after the examinations had been administered and scored. The POA did not seek back pay. (Appendix A, 3) The Ninth Circuit affirmed the district court's conclusion that the Supremacy Clause barred the application of City Charter and Civil Service rules to prevent compliance with the consent decree and federal civil rights laws. (Appendix D, 7-10; Appendix G) Petitioners do not challenge that ruling.

Petitioners have not shown that they sought individual remedies for persons allegedly victimized by discrimination in either the district court or the California Superior Court. None of the three individual petitioners has shown that he or she was denied a promotion as a result of the City's actions. In fact, two of them received promotions under the revised scoring plan.

To the extent to which petitioners argue that the original examination weights should have been used and that those who would have received promotions had those weights been used are victims of discrimination, they are wrong on both counts.

The examinations at issue here were given pursuant to a consent decree. After one of the examination components was administered but before the administration of the other two, the City established the weights for each of

the three components. (Appendix F, 4) When the examinations were completed and scored according to the weights set for the individual components, the results demonstrated severe adverse impact for minorities in both ranks and a slight adverse impact for women on one of the examinations. The United States and Officers for Justice (an organization representing minority and female police officers) filed objections under the consent decree. They contended that the examinations were not job related and showed that incumbent inspectors and sergeants, selected because of their superior job performance, had done so poorly when pretesting the examinations that they would have had no reasonable chance of appointment. A court-appointed expert reviewed the selection process and reported that insufficient attention had been paid to the issue of adverse impact, especially with regard to the use of the multiple choice test, and that alternatives which may have minimized such impact were not explored. Following receipt of the court-appointed expert's report, the City decided to withdraw the original examination results and to revise the scoring plan. (Appendix F, 5-6)

This Court's recent decision in *Wards Cove Packing Company, Inc. v. Atonio*, No. 87-1387, ___ U.S. ___ (June 5, 1989), supports the City's decision to discard the original test results. In *Wards Cove*, the Court considered the burdens imposed on an employer when it is established that a specific employment practice results in disparate impact on persons protected under Title VII. (*Wards Cove*, Section III) First, an employer must produce evidence of a "business justification" for the challenged employment practice. The Court noted that, "A mere insubstantial

justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices." Moreover, even if an employer successfully produces evidence of a business justification for a challenged practice, those challenging the selection procedure may still prevail if they:

> persuade the factfinder that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s];" by so demonstrating, respondents would prove that "[petitioners were] using [their] tests merely as a 'pretext' for discrimination."

See, Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *see also, Watson v. Fort Worth Bank & Trust,* 487 U.S. ___, ___ (1988) (O.Connor, J.).

Prior to this Court's decision in *Wards Cove,* the *Uniform Guidelines on Employee Selection Procedures,* 29 C.F.R. §1607, which provide the standard for the validity of examinations developed pursuant to the consent decree in this case (Appendix H, 18), mandated an identical result. The *Uniform Guidelines* permit employers to use different selection procedures that do not have an adverse impact on minorities and women as an alternative to validating challenged test procedures. *See,* 29 C.F.R. §1607.6A (1988); *Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures,* 44 Fed.Reg. 11,996, 12,001, Question and Answer n. 31 (1979). In order to validate a selection procedure under the *Uniform Guidelines,* the employer must consider alternative selection procedures. 29 C.F.R. §1607.3B (1988).

The City's decision to discard the original test results upon a showing that their use generated adverse impact was therefore consistent with this Court's decision in *Wards Cove* and the *Uniform Guidelines*. Accordingly, the district court and the Ninth Circuit were correct in concluding that the original test results should not be used. "The test itself was not in compliance with the Consent Decree, so the persons who did well on it did not acquire any rights." (Appendix A, 2)

Furthermore, petitioners misrepresent the record when they argue that the Ninth Circuit ordered no relief. The Ninth Circuit concluded that the City violated the consent decree by changing the weighting plan for the examination components. In so doing it emphasized, "The complaint filed by the Officers Association did not seek back pay but the declaratory relief which is here given." (Appendix A, 3) The Ninth Circuit declined to order injunctive relief based upon its finding that the supplemental order of the district court, dated October 27, 1986, protects against the City again setting scoring standards prior to an examination and then changing them after the examination has been administered. (Appendix A, 3)

The petitioners cannot meet their burden of showing that they are victims of employment discrimination under *Wards Cove*. To do so they would first have to make a *prima facie* case by showing that the City's revised selection procedure resulted in a disparate impact on a racial or ethnic group as compared to that group's representation in the qualified applicant pool. (Section II) However, because white males comprised 64 percent of those in the applicant pool and 63 percent of those selected, no such

showing can be made. Although it found that the City had used an improper method of redressing the discriminatory effect of its testing procedures, the Ninth Circuit correctly concluded that no further relief beyond insuring against repetition of the improper practice was appropriate.

The Ninth Circuit did not err in its choice of remedies in light of the violation it found in this case, the relief sought in the pleadings, and the petitioners' failure to prove that they were individual victims of discrimination.

II. PETITIONERS INCORRECTLY STATE THAT THE NINTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH DECISIONS IN OTHER CIRCUITS.

Petitioners argue that the Ninth Circuit's decision in this case directly conflicts with recent decisions of the District of Columbia, Seventh, and Fourth Circuits. However, each of the cases cited by petitioners is easily distinguishable.

In *Dougherty v. Barry*, 869 F.2d 605 (D.C.Cir. 1989), the district court found that the District of Columbia Fire Department had discriminated against several white firefighters when it promoted two black firefighters to positions as deputy fire chief. The Court of Appeals held that the appropriate remedy for the discrimination was to divide the monetary value of the two promotions among the five plaintiffs who had filed timely claims under 42 U.S.C. §1981.

In *Dougherty* the plaintiffs were a group of senior white firefighters who established that two specified

black firefighters had been promoted ahead of them to positions as deputy fire chief because of their race. 869 F.2d 605, 608. The district court found, however, that it could not be established which of the white firefighters would have received the promotions had the black firefighters not been improperly promoted, because promotions were "based on both subjective and objective factors and followed no clear pattern" and all of the plaintiffs were at least minimally qualified. 869 F.2d 605, 614. Because the defendant in *Dougherty* failed to show that any of the plaintiff white firefighters would not have received one of the promotions absent discrimination, the court ruled that they were each entitled to a remedy consisting of "a fraction of the promotions' value commensurate with the likelihood of his receiving one of the promotions." 869 F.2d 605, 615.

The instant case is distinguishable from *Dougherty* in several respects. First, none of the petitioners has established that he or she was subjected to disparate treatment or denied a promotion for which he or she was qualified due to discrimination. In fact, two of the three individual petitioners did receive promotions after the examination components were reweighted. Second, petitioners here sought no monetary relief in their action. Third, the petitioners have not shown that any of the persons who receive promotions did so because of his or her race or sex. In fact, as noted above, 76 of the 120 persons to receive promotions after the test results were reweighted were white males. (Appendix D, 5)

The Seventh Circuit's decision in *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989) is entirely inapposite to the instant case. In *Cygnar* 13 Chicago police officers established that they had been transferred from the City's

Office of Municipal Investigations to assignments within the Chicago Police Department because of their race. 865 F.2d 827, 841-842. Although each plaintiff did not suffer specific economic damages, the court concluded that each was entitled to compensatory damages, although the jury's verdict of $55,000 to each plaintiff was found to be excessive. 865 F.2d 827, 847-848.

Likewise, *Lilly v. City of Beckley, West Virginia*, 797 F.2d 191 (4th Cir. 1986) bears little relationship to the instant case. In *Lilly* a white male was refused employment with the Beckley Police Department because the City was eager to hire minorities in order to avoid an imminent threat to law enforcement funding from the federal government and other sources. The district court found that Beckley's affirmative action plan was informal and did not meet the standards of *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979). 797 F.2d 191, 193-194. The Fourth Circuit upheld the district court's award of back pay to Lilly. 797 F.2d 191, 196.

In both *Cygnar* and *Lilly* the courts of appeals affirmed damage awards to individuals who showed that they suffered adverse employment actions because of their race. No such showing has been made in this case, nor could it be made. Petitioners claim that those who would have been promoted had the examination results as originally scored been used are victims of employment discrimination. However, such persons held their qualifying positions on the list as a result of the discriminatory impact of the original weights. Nonminorities do not have a legally protected interest in promotions which could only be made pursuant to discriminatory employment practices. *Vanguards of Cleveland v. City of Cleveland*,

753 F.2d 479, 484-485 (6th Cir. 1985), *aff'd sub. nom. Local 93 v. City of Cleveland*, 478 U.S. 501 (1986). When nonminority expectations are based upon a perpetuation of discriminatory practices, a reduction in those expectations does not result in a violation of Title VII. *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983).

Petitioners cannot establish that they were victims of employment discrimination entitled to remedies which the Ninth Circuit declined to give them. Further, petitioners never sought monetary damages in the trial courts in this case and do not represent other individuals who have made claims for damages based upon race discrimination. There is no conflict between the Ninth Circuit's decision in this case and decisions of other courts of appeals.

III. THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF THE DISTRICT COURT IN THE *WILMINGTON FIREFIGHTERS* LITIGATION.

Petitioners erroneously argue that the Ninth Circuit's opinion conflicts with the district court's decision in *Wilmington Firefighters v. City of Wilmington*, 632 F.Supp. 1177 (D.Del. 1986), *dismissed as moot* 824 F.2d 262 (3d Cir. 1987). However, the rulings are entirely consistent except for the Third Circuit's decision that *Wilmington Firefighters* should be dismissed as moot, a conclusion reached by the Ninth Circuit in its second opinion but abandoned in its final decision.

Nonminority firefighters brought a reverse discrimination action against the City of Wilmington, claiming

that the City had discriminated against them by altering the scoring system for promotional examinations after the examinations had been administered. The district court enjoined the City from using the eligibility list based upon the revised scoring standards and ordered it to make promotions based upon the original scoring plan. 632 F.Supp. 1177, 1192-1193.

The first major distinction between the *Wilmington Firefighters* case and the instant litigation is that the district court in *Wilmington* found that the original scoring plan was proper under the particular terms of the consent decree in that case. 632 F.Supp. 1177, 1190; 824 F.2d 262, 264. In the instant case the Ninth Circuit found that the test as originally given was not in compliance with the consent decree. (Appendices A, 2; C, 2-3; D, 14) Because the district court in *Wilmington Firefighters* found that the original scoring standards did not create a selection procedure which violated the consent decree there, it concluded that those who would have been appointed under the original scoring scheme were victims of discrimination entitled to a remedy. In this case the Ninth Circuit found that the City appropriately discarded the initial results and that those who performed well on the test as originally scored were not victims of discrimination.

The conclusion that the examinations given here were invalid was not based simply upon their adverse impact. A court-appointed expert, Dr. Joel Lefkowitz, reported that "insufficient attention was paid to the issue of adverse impact, especially with regard to the use of the multiple choice test and that alternatives which may have

minimized such impact were not explored." (Appendix F, 5) The *Uniform Guidelines* require that such consideration be given:

> Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact.

29 C.F.R. §1607.3B.

Petitioners concede that the selection procedures based on the revised scoring standards are equally valid for the purpose of selecting qualified applicants. "The City and the POA agree that the components when reweighed are as job-related as they were under the initial weights. The alternative weighing procedure eliminates, however, the test's adverse impact." (Appendix D, 9) There can be no doubt that unlike the City of Wilmington, the City and County of San Francisco was required to discard the original test results.

The *Wilmington Firefighters* litigation has little relevance to the instant case. Its relevance is in the reasoning of the Third Circuit, which ordered that the action be dismissed as moot because no further promotions were to be made from the challenged list. 824 F.2d 262, 266. In its second decision the Ninth Circuit ordered that this case be dismissed as moot because the contested promotions had already been made and because the district court's supplemental order embodying the parties' agreement eliminated the possibility that the City would again reweight examination components after initial weights had been announced and the exam administered. (Appendix C, 3) The *Wilmington Firefighters* case supports

the conclusion that only those persons who have shown that they were victims of unlawful employment decisions which denied them positions for which they were qualified are entitled to relief under Title VII. No such showing has been made here.

IV. PETITIONERS MISCONSTRUE THE RECORD BELOW IN ARGUING THAT THE INITIAL EXAMINATION RESULTS AT ISSUE HERE WERE WITHDRAWN SIMPLY BECAUSE THEY SHOWED ADVERSE IMPACT.

Petitioners continue to mischaracterize the record below when they argue that the examination results based on the initial component test weights were withdrawn solely because of their adverse impact. Rather, the results were withdrawn because they demonstrated adverse impact, because the evidence presented to the district court indicated they could not be defended, and because an equally valid selection procedure which did not demonstrate adverse impact was available to the City. The City's determination to withdraw the challenged examination results complied with case law, federal regulations, and the recent decision of this Court in *Wards Cove Packing Company, Inc. v. Atonio*, No. 87-1387, ___ U.S. ___ (June 5, 1989).

The initial examination results demonstrated adverse impact, particularly towards minorities. Although minorities comprised 25.7 percent of those taking the examination for Q-35 Assistant Inspector, they were only 8.0 percent of those who would have been selected had the

original weights been used. Likewise, minorities comprised 25.9 percent of those who took the examination for Q-50 Police Sergeant, but only 10.4 percent of those who would have been selected based on the initial weights. Women comprised 10.2 percent of the applicants for each position, but only 5.3 percent of those who would have been selected for assistant inspector and 9.6 percent of those who would have been selected for sergeant under the initial scoring plan. (Appendix D, 3-4) While this evidence of adverse impact is not sufficient to establish that the examinations were illegal, it is sufficient under this Court's recent decisions to make out a *prima facie* case of disparate impact. *Wards Cove*, Section IIIA; *Watson v. Fort Worth Bank & Trust*, 487 U.S. ___, ___ (1988) (O'Connor, J.). Absent a showing of validity, the statistical disparities represented here would have established discrimination under the *Uniform Guidelines*. 29 C.F.R. §1607.3A. ("The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of Section 6 below are satisfied.")

Second, the evidence before the district court indicated that the initial examination results could not be validated.

> The [district] court appointed Dr. Joel Lefkowitz, an expert industrial psychologist, to review the selection process. Dr. Lefkowitz reported that insufficient attention was paid to the issue of adverse impact, especially with regard to the use of the multiple

> choice test and that alternatives which may have minimized such impact were not explored.

(Appendix F, 5) "The evidence uncovered during discovery and the findings of Dr. Lefkowitz prompted extensive settlement negotiations between the Consent Decree plaintiffs and the City." (Appendix F, 5) These negotiations led to the City's decision to establish new scoring standards. (Appendix F, 6) This result was compelled not only by the conclusions of the court-appointed expert, but by the *Uniform Guidelines* themselves.

> Accordingly, whenever a validity study is called for by these guidelines, the user should include, as part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines.

29 C.F.R. §1607.3B. The expert's finding that insufficient attention was paid to adverse impact and that alternatives which may have minimized such impact were not explored virtually guaranteed that the initial scoring system could not be validated.

Finally, the City's subsequent actions led to the development of a selection procedure which had little adverse impact and was concededly valid for selecting police sergeants and assistant inspectors. Under the revised scoring plan minorities comprised 22.3 percent and women 11.1 percent of those selected to positions as Q-35 Assistant Inspector, as compared with 25.7 and 10.2 percent respectively in the applicant pool. For the position of Q-50 Police Sergeant, minorities comprised 24 percent and women 14.6 percent of those selected, as

compared with their respective representations of 25.9 percent and 10.2 percent in the applicant pool. (Appendix D, 3-5) Moreover, "The City and the POA agree that the components when reweighed are as job-related as they were under the initial weights." (Appendix D, 9)

The procedure followed by the City appears thoroughly consistent with this Court's recent decision in *Wards Cove v. Atonio*. On the facts presented, the City may have been able to satisfy its burden to produce evidence that the examinations as originally scored served a legitimate employment goal. (*Wards Cove*, Section IIIB[1].) However, those challenging the examinations could then have shown that other tests or selection devices, which would not have generated adverse impact, would also have served the City's interests. Then the City would have found itself in the position of the employer discussed in *Wards Cove:*

> If respondents, having established a *prima facie* case, come forward with alternatives to petitioners' hiring practices that reduce the racially-disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons.

(*Wards Cove*, Section IIIB[2].)

Not only was the City required to utilize a different selection procedure rather than use the test results as originally weighted, but its decision to reweight the test components seems consistent with the *Uniform Guidelines*.

> The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if

> that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis.

29 C.F.R. §1607.5G. The use of the original examinations with a different scoring plan was justified as a way to minimize adverse impact while maintaining the integrity of the examination process.

The Police Officers' Association has conceded that the examinations as reweighted remained job related. The district court made extensive findings on this issue. It noted that all three components of the examinations were maintained and that cutoff scores for the multiple choice components were set five points above the level of minimum competency. (Appendix F, 12) The writing skills component was also established as a screening device and its use eliminated approximately 25 percent of the applicants for each position. (Appendix F, 13) The oral component was used as the sole ranking device and was highly structured to accurately measure interpersonal skills. The Police Officers' Association's own expert testified that the structured interview was objective and enhanced the reliability of the examination. The district court found that it fairly measured supervisorial skills, oral communication skills, and interpersonal skills, three of the five dimensions identified by the job analysis as

important in the successful performance of the jobs of both assistant inspector and police sergeant. (Appendix F, 13-14)

The results of the examination with the new scoring plan did not eliminate white males from consideration. In fact, they received 76 of 120 positions, as opposed to approximately 99 of 120 under the original weighting scheme. (Under the original plan white males could expect to receive 87 percent of the 45 positions as assistant inspectors and 80 percent of the 75 positions as sergeants.) It is therefore apparent that although the reweighting plan eliminated the adverse impact that flowed from the original scoring procedure, its impact on the opportunities available to white males was comparatively slight. Petitioners are incorrect when they argue that the Ninth Circuit equated disparate impact with invalidity.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari filed in this case should be denied.

DATED: July 5, 1989

Respectfully submitted,

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